Supreme Court of the United States

No. October Term, 1943.

The City of New York,

Petitioner,

against

The National City Bank of New York.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This case presents the question of whether an unexercised inchoate statutory right to redeem a lease, which is not property or an estate or interest in land, is compensable in a condemnation proceeding restricted to the acquisition of real property, instituted by the United States under tit. 40, U. S. Code, §258a. This important question of public law has not yet been passed upon by this Court. It is vitally important to all parties to condemnation proceedings that it be definitively determined by this Court.

This Court has jurisdiction to grant the writ of certiorari (tit. 28, U. S. Code, §347, subd. a) and sufficient grounds exist for granting it. The writ may be granted where the decision of the Circuit Court of Appeals is in conflict with applicable State decisions (*Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 206 [1938]); or where it is in conflict with the decisions of this Court (Rule 38, subd. 5, of the Supreme Court Rules); or where questions of impor-

tance are involved which it is in the public interest to have decided by this Court (*Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163 [1923]; *United States ex rel. Tennessee Valley Authority* v. *Powelson*, 319 U. S. 266, 271 [1943]). Where the Circuit Court of Appeals has remanded the cause for further proceedings, certiorari may be granted if the question of law to be decided by this Court is of general interest (*Cole* v. *Ralph*, 252 U. S. 286, 289 [1920]); or where review by this Court will prevent "further protracting the litigation to the extent that would be necessary in order to reach final judgments" (*Spiller* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 253 U. S. 117, 121 [1920]).

The Facts.

On May 1, 1939, the City leased to Nathan and Alexander Hudes a parcel of land in Wallabout Market (designated in this proceeding as Damage Parcel No. 55) for a term of ten years (R. 6-7). The respondent, The National City Bank of New York (hereinafter referred to as the "Bank") held a mortgage of the leasehold, executed by the tenants (R. 7). The lease contained a provision that upon default in payment of rent the term "shall come to an end as if by this lease so originally limited" and it shall thereupon "be lawful for the lessor * * * to re-enter" (R. 16).

The tenant defaulted in payment of rent for the months of February to June, 1940, inclusive. In June 1940, the City, though under no obligation to do so, informed the attorneys for the Bank of the defaults, and, at their request, refrained from instituting summary proceedings (R. 17). The defaults continued until September, 1940, when the City instituted the summary proceedings. At no time did the Bank pay or offer to pay any part of the rent due (R. 17).

On November 8, 1940, the City obtained a final order in the summary proceedings awarding it possession, and a warrant thereon was executed on November 25, 1940, in accordance with the provisions of New York Civil Practice Act, Article 83, §§1410, *et seq.* (R. 17). The issuance of the warrant terminated the lease and annulled the relationship of landlord and tenant (C. P. A., §1434). In the meantime, despite the fact that it knew that its mortgage was bound to fall by reason of the termination of the lease, the Bank made no attempt to cure the defaults, though it could have done so and thereby have protected its mortgage. *Dunlop* v. *James*, 174 N. Y. 411, 414 (1903). Obviously, it did not consider it advantageous or profitable to do so.

In March, 1941, however, when it had become a matter of common knowledge that the United States was about to condemn all of Wallabout Market for the extension of the Brooklyn Navy Yard, the Bank suddenly acquired a new interest in the terminated lease. It moved to vacate the final order and warrant in the summary proceedings and to be impleaded as a party defendant therein, with leave to cure the defaults (R. 18). The motion was granted on April 9, 1941, but on appeal by the City the application was denied by the Appellate Term of the Supreme Court, Second Department (R. 18-19). *Matter of City of New York (Hudes, et al.)*, 106 N. Y. Law Journal 103 (July 12, 1941). On September 23, 1941, the Appellate Division of the New York Supreme Court, First Department, denied the Bank's application for leave to appeal (106 N. Y. Law Journal 722).

In the meantime, on April 1, 1941, the United States had acquired fee title to Wallabout Market (R. 11). On September 24, 1941, the day following the Appellate Divi-

sion's denial of the Bank's application for leave to appeal, the Bank's attorneys served upon the City a notice of intention to redeem, in purported compliance with C. P. A., §1438 (R. 19). Then, on November 25, 1941, the Bank tendered to the City the sum of $508.41, alleged to be the total rent in arrear, with interest thereon, and the costs and charges incurred by the City, in purported compliance with C. P. A., §§1437, 1438 (R. 10). That tender was rejected (R. 10), and thereafter, on February 13, 1942, the Bank made the motion for an advance payment on account of an award.

POINT I.

Only land or estates or interests in land can be acquired under the statute pursuant to which this condemnation proceeding was instituted. Therefore, only those having estates or interests in the land may share in the award.

The statute (tit. 40, U. S. Code, §258a), under which this proceeding was instituted, provides that a petition and declaration of taking may be filed thereunder "for the acquisition of any land or easement or right of way in land for the public use." It further provides (subd. 3) that the declaration of taking shall contain "A statement of the estate or interest in said lands taken for said public use." It is clear, therefore, that under this statute the United States may acquire only real property, and may take a fee title or lesser estate or interest therein. See *New York Telephone Co.* v. *United States*, 136 F. (2d) 87, 88 (2nd Cir., 1943).

On April 1, 1941, when the declaration of taking was filed and the $4,000,000 deposit made (R. 11), the United

States became vested with fee title to all of Wallabout Market, including Damage Parcel No. 55. Simultaneously, those persons having an interest in the lands taken were vested with a right to just compensation. U. S. Code, tit. 40, §258a; *United States* v. *Dunnington*, 146 U. S. 338, 350-351 (1892); *City of Oakland* v. *United States*, 124 F. (2d) 959, 961 (9th Cir., 1942), cert. den. 316 U. S. 679 (1942); *United States* v. *150.29 Acres of Land, etc.*, 135 F. (2d) 878, 880 (7th Cir., 1943); *United States* v. *Sunset Cemetery Co.*, 132 F. (2d) 163, 164 (7th Circ., 1943). Upon such title vesting, all interests in the property were extinguished. *Duckett & Co.* v. *United States*, 266 U. S. 149, 151 (1924).

Since only real property was or could have been taken, only such persons as had an estate or interest therein at the time of title vesting could share in the award. *Silberman* v. *United States*, 131 F. (2d) 715, 717 (1st Cir., 1942); *In the Matter of Opening Eleventh Avenue*, 81 N. Y. 436 (1880); *Seton* v. *City of New York*, 130 App. Div. 148 (1st Dept., 1909); *Murphy* v. *Hirschman*, 168 App. Div. 153, 154 (2nd Dept., 1915). In *Matter of Eleventh Avenue, supra*, the Court said (81 N. Y., at p. 453): "Whoever, at the date of the awards [*i. e.*, the date of title vesting], had an estate or interest in the lands, is entitled to the proportionate value of such estate or interest as then existing." Thus the rights of all parties are fixed as of the date of title vesting. Nothing can transpire thereafter to alter or enlarge such rights. *Danforth* v. *United States*, 308 U. S. 271, 284 (1939); *Roberts* v. *Northern Pacific R. Co.*, 158 U. S. 1 (1895); *People of Puerto Rico* v. *United States*, 134 F. (2d) 267, 272-273 (1st Cir., 1943); *Gates* v. *De La Mare*, 142 N. Y. 307 (1894); *Home Insurance Co.* v. *Smith*, 28 Hun (N. Y.) 296 (1st Dept., 1882); *Jackson* v. *State of New York*, 213 N. Y. 34, 36 (1914); *Matter of Van Etten* v. *City of New York*, 226 N. Y.

483, 489 (1919); *Matter of City of New York (43rd Avenue)*, 256 App. Div. 982 (2nd Dept., 1939), aff'd 282 N. Y. 42 (1939). Consequently, unless the unexercised inchoate statutory right to redeem which the Bank had on April 1, 1941, constituted an estate or interest in the lands acquired, the Bank was not entitled to share in the award.

POINT II.

On April 1, 1941, the date of title vesting, the Bank had merely an unexercised inchoate statutory right to redeem. This right did not constitute property or an estate or interest in land but was a special and limited privilege. Therefore, the Circuit Court of Appeals erred in holding that, because the right was valuable, the Bank was entitled to compensation.

1. The statutory right to redeem a lease.

As has been noted (*ante*, p. 13), the lease upon which the Bank held a mortgage was terminated on November 8, 1940, when the warrant to remove the tenant was issued (C. P. A., §1434).

Under C. P. A., §1437 (*post*, p. 30), the lessee may redeem a lease at any time within one year after the execution of the warrant of removal by paying or tendering to the landlord all rent in arrear with interest thereon and the costs and charges of the summary proceeding. Thereupon, the lessee is entitled to possession of the premises and to hold the same according to the terms of the original demise.

Section 1438, C. P. A. (*post*, pp. 30-32) provides for redemption by a creditor, or a mortgagee of the leasehold. Under it, a mortgagee who has given the prescribed notice

of intention "may redeem for his own benefit in like manner as the lessee", if the lessee has not redeemed or waived his right to redeem, before 2 P. M. on the day "next succeeding the last day of the year" allowed for redemption by the lessee. Since the warrant of removal was executed on November 25, 1940 (R. 8), under this statute the Bank had only one day on which it could exercise its right to redeem, to wit, November 25, 1941. Therefore, on April 1, 1941, when title vested, its right to redeem was inchoate.

Civil Practice Act, §1440 (*post*, p. 32) provides *inter alia*, that "A person, other than the lessee, who redeems as prescribed in the last three sections succeeds to all the duties and liabilities of the lessee accruing after the redemption as if he was named as lessee in the lease". Under this section the Bank's right to redeem was a mere option to enter into contractual relations with the City, and to become its lessee.

2. The Bank's inchoate statutory right to redeem was not property or an estate or interest in land.

The right to redeem here involved is purely a creature of statute. It comes into being only after the lease is cancelled and terminated. It is a special and limited privilege which gives the mortgagee the option of succeeding to the lessee's rights and liabilities, as if it "was named as lessee in the lease" (C. P. A., §1440).

Exhaustive research has failed to reveal a single authority in which the nature of the statutory right to redeem a lease is discussed. Such a right has characteristics identical with the statutory right to redeem property after foreclosure sale. Both are statutory. In both cases, former

owners have been completely divested of their estates which may be revived in the manner prescribed by statute. Accordingly, the cases cited immediately below, involving the statutory right to redeem after foreclosure sale, are applicable to and determinative of the statutory right to redeem a lease terminated and cancelled by a warrant of removal.

The decisions have uniformly held that a statutory right to redeem is not an estate or interest in land; indeed, it is not property in any sense. *Pell* v. *Ulmar,* 18 N. Y. 139 (1858); *McGowan* v. *Williams,* 241 Ala. 588, 4 So. (2d) 164 (1941); *Denson* v. *Provident Mut. Life Ins. Co.,* 231 Ala. 574, 166 So. 33 (1936); *Allison* v. *Cody,* 206 Ala. 88, 89 So. 238 (1921); *Toney* v. *Chenault,* 204 Ala. 329, 85 So. 742 (1920); *Whiteman* v. *Taber,* 203 Ala. 496, 83 So. 595 (1919); *Lewis* v. *McBride,* 176 Ala. 134, 57 So. 705 (1912); *Banking Corp. of Montana* v. *Hein,* 52 Mont. 238, 156 Pac. 1085 (1916); 42 C. J., tit. "Mortgages," §2080, p. 352; 2 JONES, *Mortgages* (8th Ed.), §§1334, 1335, pp. 795-798.

In *Pell* v. *Ulmar, supra,* the Court, speaking of the statutory right to redeem, said (18 N. Y., at pp. 144-145):

> "It [the statute] declares in very explicit language that a default in the payment of interest for twenty-three days after it falls due, shall be, *ipso facto,* a foreclosure and extinguishment of the equity of redemption, and that thereupon an unredeemable estate shall vest in the commissioners; and then it proceeds to give a certain right to the mortgagors to have his land again upon making certain payments. This is not reinstating the equity of redemption in its original vigor and with its common law incidents, *but a special and limited privilege,* which can only be availed of by a substantial compliance with the condition upon which it is given." (Emphasis supplied.)

And further (p. 146):

> "If we hold this not to be an interest in the land, but a special right to redeem, unaccompanied with the incidents of an equitable estate, the several provisions are in perfect harmony; and such, in my opinion, is the true construction."

It is readily apparent that a statutory right to redeem has none of the attributes of property. It is not subject to execution even under a statute which provides that all property, both real and personal, or any interest therein, of the judgment debtor, is liable to execution. *Hamilton* v. *Hamilton,* 51 Mont. 509, 154 Pac. 717 (1916); *Brown* v. *Timmins,* 79 Mont. 246, 256 Pac. 176 (1927); *Hillsdale College* v. *Thompson,* 99 Mont. 400, 44 Pac. (2d) 753 (1935); *McGowan* v. *Williams, supra,* 241 Ala. 588, 4 So. (2d) 164; *Federal Land Bank of New Orleans* v. *Ozark City Bank,* 225 Ala. 52, 142 So. 405 (1931). Likewise, it is not subject to attachment even where the statute provides that *all property* shall be subject to seizure. *State ex rel. Hopkins* v. *Stephens,* 63 Mont. 318, 206 Pac. 1094 (1922); *Central Mining & Mfg. Co.* v. *Stoven,* 45 Ala. 594 (1871). Nor does it pass to a trustee in bankruptcy as property of the bankrupt. *In re Smith,* 9 F. Supp. 277 (D. C., S. D. Iowa, 1934).

In *Wissmath Packing Co.* v. *Mississippi River Power Co.,* 179 Iowa, 1309, 162 N. W. 846 (1917), it was held that a statutory right to redeem was not compensable, as such, in a condemnation proceeding brought under an Act of Congress which provided that compensation should be made for the taking of or injury to "lands or other property". The Court decided that plaintiff's right to redeem was not an estate or interest in lands (179 Iowa, at pp. 1326-1327), and said (p. 1329): "It could not have recovered the value of its so-called 'right of redemption' ".

It is thus clear that the statutory right to redeem is not property and is not an estate or interest in land. Therefore, the holder of such a right is not entitled to share in an award made in a proceeding involving the acquisition of real property.

3. The test of compensability laid down by the law of New York and the decisions of this Court.

(a)

The test of compensability in a proceeding under the New York law respecting the taking of property for public use by the City of New York is particularly applicable here. For the New York statute (New York City Charter, §381) provides that "The city may acquire title in fee to real property or any interest therein whenever required for any public or municipal use * * *." It is therefore substantially identical with the statute under which this proceeding was brought.

In interpreting that statute and determining what interests are compensable in proceedings brought thereunder, the New York Courts have uniformly held that only real property or an interest therein is compensable. Thus, in *Matter of City of New York* (*Allen Street*), 256 N. Y. 236 (1931), the Court of Appeals said (p. 239): "Upon this appeal the only question presented is whether the tenant's fixtures are 'real property' within the meaning of the statute." Similarly, in *Matter of City of New York* (*Whitlock Avenue*), 278 N. Y. 276 (1938), the Court, in reversing an award for a concededly valuable claim, said (p. 281): "We are to determine whether the machinery and the other articles for which the awards have been made are part of the real property taken by the city in the condemnation proceeding." See also *Matter of Opening of Eleventh Ave-*

nue, supra, 81 N. Y. 436; *Gates* v. *De La Mare, supra,* 142 N. Y. 307, 311-313; *The Bank of Auburn* v. *Roberts,* 44 N. Y. 192, 202, 203 (1870); *Matter of City of Yonkers,* 222 App. Div. 690 (2d Dept., 1927).

(b)

This Court has in a very recent case defined the rights which are compensable in a condemnation proceeding. *United States ex rel. Tennessee Valley Authority* v. *Powelson, supra,* 319 U. S. 266. There, the claimant owned lands which were condemned by the Government under U. S. Code, tit. 16, §831x and tit. 40, §258a (p. 270), the latter being the very statute involved in the instant proceeding. The claimant contended that in determining the value of the property it was proper for the Court to consider the claimant's right to acquire adjoining lands by eminent domain, granted by the State of North Carolina (pp. 270-271, 276). The District Court had characterized the claimant's right as "a valuable right, which is destroyed by this condemnation proceeding" (p. 279), and the Circuit Court of Appeals had affirmed that phase of the case (pp. 271, 275). In reversing the award, this Court held that though the right might be valuable it did not follow that it was "private property" within the meaning of the Fifth Amendment (pp. 279-280). In that connection, this Court said (p. 281):

> "The landowner is, to be sure, deprived of a preferential advantage, which was an incidental attribute of the public authority with which the state endowed him. But that advantage had no higher dignity than a promise of a gratuity. It had not been availed of to develop an existing and going enterprise which the United States appropriated. Respondent's project was only a speculative venture—a promotional

> scheme wholly *in futuro*. Thus we conclude that respondent had no interest under his unexercised power of eminent domain which rises to the estate of 'private property' within the meaning of the Fifth Amendment. Cf. *Rundle* v. *Delaware & R. Canal Co.*, 14 How. 80, 94.
>
> This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment."

And further (p. 283):

> "That which is not 'private property' within the meaning of the Fifth Amendment likewise may be a thing of value which is destroyed or impaired by the taking of lands by the United States. But like the business destroyed but not 'taken' in the Mitchell case [267 U. S. 341] it need not be reflected in the award due the landowner unless Congress so provides."

This Court then went on to make it clear that it was deciding that an unexercised power of eminent domain is not compensable in condemnation, and said (p. 283):

> "It is no answer to say that the evidence as to the profits from respondent's hypothetical four-dam project was introduced not as the basis of an award for loss of profits or business but only as a basis for estimating the true water power value of the property. The computation of those profits assumes the very existence of the projected enterprise which the power of eminent domain alone could make possible

and which these condemnations frustrated. We repeat that an allowance of any such value would entail a payment for the loss of a business prospect based on an unexercised power of eminent domain. As we have said, no reason based on precedent or principle appears why respondent's privilege to use the power of eminent domain should be treated as 'private property' within the meaning of the Fifth Amendment so as to give rise to a private claim against the public treasury. Nor is there any indication that Congress adopted in this regard a more liberalized standard of compensation than would be provided under the Fifth Amendment."

4. The rule of compensability adopted by the Circuit Court of Appeals is contrary to the decisions of the Courts of New York and of this Court.

(a)

We have demonstrated (*ante*, pp. 17-23) that the Bank's inchoate statutory right to redeem was not property or an estate or interest in land and that the Courts of New York and this Court have held that only such rights are compensable. The Circuit Court has established a test of compensability in conflict with this rule. It has said (R. 52, 53):

> "We see no reason to grope about in the mysterious world of 'estates' and 'interests not estates'. The law of New York has put the matter on a very practical basis: a right with respect to property taken in condemnation may be so remote or incapable of valuation that it will be disregarded in awarding compensation; otherwise it will not be disregarded. * * * we think that the right to compensation is to be determined by whether the condemnation has deprived the claimant of a valuable right rather than by whether his right can technically be called an 'estate'

> or 'interest' in the land. * * * There was enough likelihood of redemption by the Bank to give its right value, and that, we think, should be the test of its compensability."

It is at once apparent that the rule thus enunciated is directly contrary to this Court's decision in the *Powelson* case, *supra*. For there this Court held that though the right may be of great value and may be a right with respect to property, it was not property, and, therefore, not compensable under the very same statute pursuant to which the instant condemnation proceeding was brought. Manifestly, the Bank's unexercised statutory right to redeem the lease is no more a property right than was the claimant's unexercised statutory right of eminent domain in the *Powelson* case.

(b)

We shall now show that the New York cases cited by the Circuit Court of Appeals (R. 52-53) do not support the test of compensability adopted by it. Thus, in *First Reformed Dutch Church* v. *Crosswell*, 210 App. Div. 294 (3rd Dept., 1924), app. dism. 239 N. Y. 625 (1925) the Court first decided that the rights of reverter there involved actually were an interest in land, for it said (p. 295), "It [the City of New York] also seized the rights of reverter belonging to the heirs at law of the grantors", and the City, as we have stated, had power to take only real property and interests therein. However, the Court denied compensation to the grantor's heirs for the rights of reverter because they were not able to show that their property rights had any value. To obtain an award a claimant must show not only that he has a property right, but that such right has value.

In *Matter of City of New York (North Conduit Avenue)*, 262 App. Div. 70 (2nd Dept., 1941) the condition subsequent had been breached *before* title vested in condemnation, and, as the Court said (p. 72), "the inchoate right of re-entry ripened into an actual right" and was (p. 73) "no longer contingent but absolute". The claimant, heir of the grantor, was therefore given the entire award, thus compensating him as the owner of the fee by re-entry, and not as the owner of a mere right of re-entry.

Matter of City of New York (Cropsey Avenue), 268 N. Y. 183 (1935), involved an award for an inchoate right of dower. As the case makes clear, this right is considered to be "among the most highly and widely cherished *property rights* resulting from marriage" (p. 186; italics ours). Moreover, the right is protected out of moral, rather than legal, considerations, and is *sui generis* in the law of property. *Byrnes* v. *Owen*, 243 N. Y. 211, 216 (1926); *Clifford* v. *Kampfe*, 147 N. Y. 383, 385-386 (1895); *Denton* v. *Nanny*, 8 Barb. 618, 620-621 (Sup. Ct., N. Y., 1850).

In *Matter of City of New York (North River Waterfront)*, 118 App. Div. 865 (1st Dept., 1907), aff'd 189 N. Y. 508 (1907), the only question involved was whether the tenant was entitled to an award for trade fixtures. The Court pointed out (p. 866) that the lease contained a provision that the landlord, at its option, would either grant a renewal for a similar term or pay the tenant the fair value of the structures erected by the latter. In its opinion, the Court said (p. 867):

> "What the tenant is entitled to is the fair market value of the property that is taken. That property is the value of the leasehold, which includes the probability of a renewal of the lease which would result in his being allowed to continue as lessee and

> use all of this property in connection with the building, and it seems to me, in view of this right that the tenant had in connection with his occupation of the property, that justice requires that the City should pay him for the property which is a part of the building and which has little or no value separated from the property which the City takes for its own purposes."

It is clear that the Court meant only that because of the valuable lease, "which includes the probability of a renewal", the tenant was equitably entitled to an award for the fixtures. Moreover, the option of renewal was entirely with the landlord, and, therefore, it is manifest that the right of renewal, as such, was not a right of value in the tenant. Furthermore, the record shows that the tenant never made a claim for the value of the leasehold or the right of renewal, nor was any award made therefor; the award was limited to the fair value of the fixtures. The case can, therefore, hardly be said to be authority for the proposition that the right of renewal of a lease is compensable, as such.

The Circuit Court of Appeals stated (R. 53) that *Matter of City of New York (North River Waterfront)*, *supra*, is not in conflict with *Matter of City of New York (Upper New York Bay)*, 246 N. Y. 1 (1927), cert. den. *sub nom. Greater New York Dock & Warehouse Co.* v. *Stapleton Dock & Warehouse Corp.*, 276 U. S. 626 (1928), upon which the City relied in the Court below. In the latter case it was held that an unexercised option to purchase contained in a lease was not compensable in condemnation. As we have shown, the former case did not involve the compensability of an option; the latter case did. The Circuit Court, in attempting to distinguish the latter case (R. 53), pointed to the fact that the lease contained a provision that it was to terminate

upon condemnation and that the New York Court of Appeals had said (246 N. Y., at p. 33): "This terminates the option as well as the lease."

It is for this precise reason that the *Upper New York Bay* case is authority for the position which we take. In the first place, under the New York statute (Administrative Code, Laws of New York 1937, ch. 929, §B15-37.0; formerly Greater New York Charter, §979) all contracts, including leases, "shall cease and determine and be absolutely discharged" upon vesting of title in condemnation. Accordingly all leases, including options contained therein, terminate upon condemnation, even in the absence of such a provision in the lease.

In the second place, the New York Court stated (pp. 32-33) that the option had been unexercised at the time of the taking, and that "The option alone gave the lessee no interest in the real estate." It was for this reason that the Court reversed the award which had been made to the lessee for the value of the option. See also *Taggarts Paper Co.* v. *State of New York*, 187 App. Div. 843, 848 (3rd Dept., 1919).*

Finally, the Court of Appeals in the *Upper New York Bay* case noted (246 N. Y., at p. 33) the gross inequity which would result in permitting the lessee to take advantage of the option if the award were greater than the option price and refuse to exercise the option if the award were in a lesser amount. The Bank here is in a similar position. *Cf. Pursell* v. *N. Y. Life Ins. & Trust Co.*, 10 J. & S. (42 N. Y. Super. Ct.) 383, 390 (1877). As we have shown (*ante*, pp. 12-14), it refrained for many months from doing anything

* As we have shown (*ante*, p. 17), the Bank's statutory right to redeem the lease in the instant case was nothing more than an option to enter into a lease with the City, under the last sentence of §1440, C. P. A. (*post*, p. 32). Since this option, too, was unexercised at the time of title vesting, it gave the Bank "no interest in the real estate."

to protect its interests and moved only when it became known that the Government was about to condemn. Furthermore, just as the lessee in the *Upper New York Bay* case sought an award without having subjected itself to liability upon the option, the Bank, here, sought an award though it could not and did not subject itself to liability under the lease upon redemption, as contemplated by C. P. A., §1440. The same reasons for denying an award to the lessee in the *Upper New York Bay* case are therefore applicable to the Bank's claim herein.

The test of compensability established by the decisions of the New York Courts in proceedings brought for the acquisition of real property is whether the right for which an award is sought is an estate or interest in land. This Court has held that the right must be property within the meaning of the Fifth Amendment. Unless it is property or an estate or interest in land, no compensation is made even though it may be a valuable right. The Bank's unexercised inchoate statutory right to redeem was not property nor an estate or interest in land. Neither under the Constitution or the condemnation statute nor under the rule laid down by the Courts is the Bank entitled to share in the award.

5. The effect of the decision of the Circuit Court of Appeals is to deprive the City of just compensation.

As owner of the land taken by the Government, the City is entitled to an award representing its fair fee value subject only to liens and encumbrances which were interests in the land at the time of title vesting. Since, as we have shown, the bank's right to redeem the lease was not an

interest in land, the Circuit Court's decision, holding that it was entitled to share in the City's award, deprives the City of just compensation for the taking of its land. This deprivation of just compensation constitutes a clear violation of the Fifth Amendment of the Constitution of the United States. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324-326 (1893); *Olson* v. *United States,* 292 U. S. 246, 254-255 (1934).

Conclusion.

The Petition for Certiorari should be granted.

New York, N. Y., March 24, 1944.

Respectfully submitted,

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